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CPLR 308(4): Court-Ordered Service on Defendant's Insurer Set Aside

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would further increase the probability of sloppy service. Exceptions to actual service, therefore, should be severely limited, lest the exceptions become the rule.

CPLR 308(3): Server's testimony as to custom and habit allowed to cure defect in affidavit of service.

In *Peninsula National Bank v. Hill*,[15] defendant moved to set aside service of a summons and vacate judgment solely because of a defect in the affidavit of service. The challenge was made approximately five and a half years after entry of judgment following an intentional and deliberate default. Plaintiff's process server testified he had no recollection of the service, and was denied by the lower court the opportunity to testify as to his usual custom and habit in situations requiring substituted service.

The appellate term, second department, however, reversed, and held that the server's testimony was adequate to establish the mode of service in the present case and cure the defect in the affidavit.[16]

CPLR 308(4): Court-ordered service on defendant's insurer set aside.

As the courts order service under CPLR 308(4) with increasing frequency, guidelines continue to be set regarding what methods of court-ordered service are permissible in certain circumstances.[17] Added to the montage is *Brodsky v. Spencer*.[18] There, the action arose from an automobile accident, and service was made by court order pursuant to 308(4) upon the Secretary of State and the defendant's insurer. The service was set aside by the same court as not "reasonably calculated to give the defendant the required

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[15] 52 Misc. 2d 903, 277 N.Y.S.2d 162 (App. T. 2d Dep't 1966).

[16] *Id.* at 903, 277 N.Y.S.2d at 163.

[17] *See, e.g.*, Sellars v. Raye, 25 App. Div. 2d 757, 269 N.Y.S.2d 7 (2d Dep't 1966); Dobkin v. Chapman, 25 App. Div. 2d 745, 269 N.Y.S.2d 49 (2d Dep't 1966); Deredito v. Winn, 23 App. Div. 2d 849, 259 N.Y.S.2d 200 (2d Dep't 1965); Winterstein v. Pollard, 50 Misc. 2d 354, 270 N.Y.S.2d 525 (Sup. Ct. Nassau County 1966). *See generally The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 134-36 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 644, 648-49 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 462, 475-76 (1967); *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 279, 296-98 (1966); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 140-42 (1965).

[18] 53 Misc. 2d 4, 277 N.Y.S.2d 802 (Sup. Ct. Monroe County 1966).

notice," since it was known that the insurer had no knowledge of the defendant's whereabouts.[19]

While the decision in the present case is commendable, it indicates that much of the law interpreting the statutory language of 308(4) is being made by the lower and intermediate courts of New York. Therefore, unless silence means acceptance, practitioners will have to await an interpretation by the Court of Appeals to know how far the New York courts may go in fashioning orders under 308(4).

ARTICLE 10 — PARTIES GENERALLY

CPLR 1001: Dismissal for failure to join necessary party.

Where both a husband and wife signed a contract for the purchase of a home, the supreme court, in *Mechta v. Scaretta*,[20] held that the wife was a necessary party to an action to recover the down payment and that in her absence the action could not proceed.

CPLR 1001(a) provides that necessary parties are persons who might be inequitably affected by a judgment, or persons whose absence would preclude complete relief between plaintiff and defendant. Necessary parties shall be made either plaintiffs or defendants.[21] When such a person is not joined, and jurisdiction over him cannot be obtained, the court may allow the action to proceed if justice requires. In determining whether to allow the action to proceed, CPLR 1001(b) directs the court to consider: (1) whether plaintiff has another effective remedy if the action is dismissed for non-joinder; (2) whether the defendant or the person not joined will be prejudiced thereby; (3) whether such prejudice might be avoided; (4) whether the court might fashion a protective measure; and, (5) whether an effective judgment can be rendered in the party's absence.

Compulsory joinder is by no means a new development in the law. CPLR 1001 did not change the law, but rather was

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[19] 53 Misc. 2d at 5, 277 N.Y.S.2d at 804. While the court indicated that the defendant, in fact, had received no notice of the pending action, even if he had, due process would not be satisfied unless the mode of service was reasonably calculated to give the defendant notice. *See also* Wuchter v. Pizzutti, 276 U.S. 13 (1928).

[20] 52 Misc. 2d 696, 276 N.Y.S.2d 652 (Sup. Ct. Queens County 1967).

[21] For example, joint obligees and joint obligors are necessary parties, but joint tort-feasors are not because they are jointly and severally liable. 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1001.06 (1965).